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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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No. 627

WILLIAM B. COLLINS, INDIVIDUALLY, AND AS TRUSTEE FOR JEREMIAH F. COLLINS, VERA COLLINS, SISTER MARY ST. URSULA AND CLARA COLLINS,

Petitioners,

vs.

ANN O'BRIEN, JEREMIAH SULLIVAN, ESTATE OF CATHERINE SULLIVAN, DECEASED, AND ESTATE OF SUSAN S. IRVING, DECEASED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM B. COLLINS,
Counsel for Petitioners.

ROBERT L. COLLINS,
Of Counsel.

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Petitioners,

vs.

ANN O'BRIEN, JEREMIAH SULLIVAN, ESTATE OF CATHERINE SULLIVAN, DECEASED, AND ESTATE OF SUSAN S. IRVING, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Come now the Petitioners, William B. Collins, individually, and Jeremiah Collins, Clara Collins, Vera Collins and Sister Mary St. Ursula, by William B. Collins, their Attorney, and pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the

District of Columbia Circuit, entered in the above entitled case on November 19, 1953.

Opinions Below

The judgment of the Court of Appeals was entered on November 19, 1953 (R. p. 179) and the opinion of the Court of Appeals in all except the account action are unreported. The account appeal opinion in *Collins* v. *Miller* is reported in 198 Fed. 2d 948, 91 Appeals D. C. 143.

Jurisdiction

The judgment of the Court of Appeals was entered on November 19, 1953 (R. p. 179). Petitions for rehearing were denied on December 10, 1953 (R. p. 191). The jurisdiction of this Court is invoked under Title 28 U. S. C. #1254(1).

Question Presented

This litigation involves the Due Process of Law Clause of Amendments V and XIV of the Constitution of the United States, and the validity of a plenary proceeding to determine heirs under Title 19, #311, District of Columbia Code where the District Court sitting in probate as a Court of limited jurisdiction assumed the power to reopen a closed proceeding after exceptions and briefs had been filed to the First Report and Award of a Special Master; and the further assumed power of the District Court of the District of Columbia sitting in probate to allow a petition to reopen as to new claimants who had been barred by service of an *in rem* Order of Publication Final on December 15, 1947, requiring appearance and answer by all claimants under oath by said day. The appellees did not appear until April 1950 more than two and one-half (2½) years after the order dated September 2, 1947, all in violation of Rule 60(b) Federal Rules of Civil Procedure; and it further

involves the validity of an alleged stay order depriving petitioners who had appeared timely, from the right of appeal for almost three years; and it finally involves the question as to whether the respondents could intervene in violation of Rule 24 Fed. Rules Civil Procedure, in a void reopened proceeding almost three years after they were barred, and whether the District Court, by its orders, had the power to collaterally attack its own valid orders.

This case presents important questions of law regarding the trial before the Special Master concerning errors of law on his part in the admission of relevant testimony and failure on his part to give proper weight to relevant and material evidence in the case. The Special Master excluded evidence of resemblance and admitted identity of three identical names in the two families and of traditional evidence only after repeated objections to his rulings with great reluctance, but gave this evidence and other evidence of a traditional nature no weight or consideration in his findings and award (First Report) (R. 79); but demanded and weighed only documentary evidence. His erroneous attitude and rulings on these matters resulted in errors of law in his findings.

This case in the original instance presents the basic question whether a party who has appeared in time for a hearing may later be placed under a stay order and his rights adjudicated in a trial from which he is excluded and in which only "evidence in favor" of delinquent claimants is admitted in proceedings conducted in Ireland and in Washington without notice of time or place.

Questions Presented

I. Can the District Court in an *in rem* probate plenary proceeding cite all interested parties by publication to appear and answer under oath by December 15, 1947 (R. 91),

hold hearings in May, 1948, close the proceeding on June 14, 1948, enter a Report and Award on August 19, 1948 (R. 79), have exceptions filed in November, 1948 and then violating Rules 53(e)(2) and 60(b); allow a reopening of the proceeding in May, 1949 (R. 102), and make an award of the assets of the estate to still later interloping claimants (the respondents here) who did not appear and answer under oath the Order of September 2, 1947 until April, 1950?

II. Can petitioners who appeared timely in December, 1947 and who presented their claims in May, 1948, at a trial before the Special Master, be excluded from all hearings of the new reopened proceedings by an Order of May 18, 1949 (R. 102), which allows only "evidence in favor of" said later claimants; and is this due process of law under Amendments V and XIV?

III. Can the District Court collaterally attack its own Order of September 2, 1949 (final) by numerous later orders reopening the proceeding all in violation of Rule 53(e)(2) and 60(b) Federal Rules of Civil Procedure?

IV. Has the District Court sitting in probate the power as a Court of limited jurisdiction with no inherent power and limited to express powers under Title 11-512 District of Columbia Code (R. 96), to reopen a proceeding in the absence of specific statute after the term at which a proceeding has been heard?

V. This case presents important questions of the construction and application of certain sections of the District of Columbia Code—Title 13-108, Title 13-109, Title 13-111 and Title 13-113 (R. 107-109), which have not been but should be settled by this Court.

Title 13-108, D. C. Code clearly applies to this case providing service by publication "against the unknown heirs of deceased persons." The heirs in this case were un-

known—therefore the publication. Title 13-113 relates to "parties". When it is unknown that one, who, if living, would be a proper party in any judicial proceeding, is living or dead, he may be proceeded against as if he were living. At any rate Title 13-113 was expressly repealed wherever in conflict with the Rules (F. R. C. P.) and this Title 13-113 conflicts with Rule 24, F. R. C. P. and is repealed.

Statement of Facts

On April 26, 1946, James L. Collins died intestate at Washington, D. C., his residence, leaving an estate of approximately $130,000, plus dividends and interest, in *personalty,* subject only to a claim for funeral expenses. Letters of administration were duly applied for and were granted June 27, 1946. The petition for Letters of Administration, filed May 3, 1946, stated that so far as the Petitioners (in that proceeding) knew the decedent had no known relatives. Citation and publication were had against unknown heirs at law and next of kin before the appointment of the administrators. The District of Columbia filed an answer to the petition claiming that it was entitled to the property by right of escheat.

On July 18, 1947, the administrators filed a petition for a plenary proceeding of Title 19, Section 311, of the District of Columbia Code, 1940 edition, requesting that process be issued to all persons claiming that they are entitled to distributive shares of the estate, that service be had either personally or by publication in accordance with the provisions of Title 13, Sections 108-113 of said Code, and that a Special Master be appointed to hear evidence on any claims that might be presented and to report his findings to the District Court.

On July 21, 1947, the said District Court issued an order authorizing the plenary proceeding and directing that pro-

cess issue by subpoena to all named persons and to the unknown next of kin of James L. Collins, deceased, and that as to all parties "not to be found" service by publication be had pursuant to Title 13, Sections 108-113 inclusive. On September 2, 1947, the District Court issued an order of publication directed to certain named claimants, including petitioners, "and all the unknown heirs and next of kin of James L. Collins, deceased, and all other persons concerned having or claiming to have any right, title, interest or claim in and to said estate be and they are hereby commanded to appear in this Court on the 15th day of December, 1947, to answer under oath the said petition and to show cause, if any they have, why they severally have any interest in said estate, or why they severally claim any right to distributive shares in said estate as well as also why the prayers of said petition should not be granted and a Master appointed as therein prayed,—"

Process by subpoena and publication was had against all parties in interest, including heirs at law and next of kin of James L. Collins, decedent, and against all other persons claiming to have any right or interest in the estate and commanding them to appear and answer on December 15, 1947, for the purpose of showing cause why they have an interest in or claim to any distributive share to, the estate.

Answers to the administrators' petition of July 18, 1947, were filed by certain claimants, including William B. Collins (R. 66) and Sister Mary St. Ursula Collins (R. 65) in which they set forth their claims to a distributive share of the estate. On December 17, 1947, the said Court passed an order referring the plenary proceeding to the Special Master.

Hearings were held before Theodore Cogswell, the Special Master on March 3 and May 12, 1948, and the record was closed on June 14, 1948.

The Special Master released his Report and Award on August 19, 1948, (R. 79) denying all claims including the claims of Petitioners to the estate and concluded that the estate should escheat to the District of Columbia.

Petitioners filed Exceptions to the Special Master's Report and Award on December 1, 1948, supplemental Exceptions, December 22, and brief in support of the Exceptions on February 14, 1949, in which there was set out in full the errors of the Special Master in failing to find that petitioners were the heirs at law and next of kin of the deceased.

Petitioners never were allowed to argue the Exceptions or set out in oral argument the substance of the legal position set forth in the brief although a hearing was supposedly held for that purpose on April 27, 1949. Instead of allowing these petitioners their right as parties as a matter of law, under Rule 53(e) (2) F.R.C.P. to argue their position, the Court, lacking jurisdiction erroneously and wrongfully allowed the strangers hereinafter mentioned who had had no previous connection with the case and who had failed to answer to the citation within the time allowed by law to make their motion to re-open and argue the same. The caption on the motion to re-open is as follows: (R. 102)

Motion to re-open cause for the purpose of permitting the claims of Nellie Collins who has filed her appearance herein and who claims to be an heir and next of kin of James L. Collins, deceased, motion to set a day certain for the presentation of the claims of Nellie Collins and evidence in support thereof before the Special Master appointed herein for such purpose, and motion to stay the adoption by this Honorable Court of the Special Master's Report filed herein August 19, 1948, until after Nellie Collins has had an opportunity to present her claims to this Honorable Court.

This motion resulted in the Order of the Court dated May 18, 1949, under which the Court placed petitioners and the

entire first proceeding under a stay order. This stay put your petitioners in legal moth balls for an indeterminate sentence which actually lasted until May, 1952. During this three year interim your petitioners had no power to introduce evidence against the later claims.

As late as April, 1950, the Respondents in this proceeding opposing petitioners, Jeremiah Sullivan and Ann O'Brien tried to intervene in this void proceeding opened up under the Order of May 18, 1949. The District Court called this opening up by Respondents here an intervention. Your petitioners opposed this new re-opening called an intervention because it was a flagrant violation of 60(b) F.R.C.P. and mere change of name of a pleading does not change its character.

Actually the respondents here, if they did get into a void re-opened proceeding had to proceed even at that late day over 2½ years after the Special Master filed his First Report and Award, and almost three years after the Special Master closed the case had to apply under Rule 60(b) F.R.C.P. but they were too late for that and so they called their coup an intervention—and all they got into was a void proceeding under a void order of May 18, 1949.

Reasons for Allowance of the Writ

I. The Court of Appeals has affirmed procedure of the District Court in Probate which denies petitioners "due process of law" guaranteed by Amendment V and Amendment XIV to the United States Constitution. The District Court by order dated September 2, 1947, provided for service on respondents and all unknown heirs by publication under Title 13-108 D. C. Code. (R. 91-92) Petitioners answered within the alloted time before December 15, 1947. Respondents failed to answer and on May 12, 1948, hearings were held and the proceedings closed and a Report and

Award made by the Special Master on August 19, 1948, (R. 79) to which exceptions were timely filed by petitioners. On May 18, 1949, the proceeding was re-opened and your petitioners were placed under a void stay order, which prevented petitioners from having the right of appeal until July 18, 1952. Between May 18, 1949, and July, 1952, void and illegal hearings were held at which only evidence in favor of the claims of the later claimants was received, petitioners being under a stay order and being prohibited from producing evidence *against* said claims, were illegally deprived of their property without "due process of law."

II. The question of the universal jurisdictional effect of Rule (60) (b) F.R.C.P. standing alone would be sufficiently important to warrant this Honorable Court in granting this petition, but in addition, we have the interpretation as to whether the diligent claimant can be penalized by being placed under a stay order while those tardy claimants are allowed complete freedom of action in re-opened hearings held all the way from Washington, D. C. to Southern Ireland, and at various points in between, from all of which hearings petitioners as timely claimants are excluded by a void order of intervention, which collaterally attacked a valid service by publication in an *in rem* probate proceeding.

III. The Court of Appeals in this proceeding has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure by the United States District Court, holding a Probate Court as to call for this Court's power of supervision. It has erroneously construed and improperly applied designated provisions of the District of Columbia Code, the Federal Rules of Judicial Procedure, Rule 60(b), (R. 98) Rule 24, (F.R.C.P.) "Upon timely application anyone shall be permitted to intervene in an action." Rule 53(e) (2) (R. 98), on granting a hearing before sending the proceeding back

to the Special Master, dodged the question of timeliness under Rule 24, F.R.C.P., in the application for intervention by erroneously following Title 13-113, (R. 109) of the D. C. Code as the "governing statute" and ignoring Title 13-108 of the D. C. Code, (R. 107) which clearly governed the proceeding "on the unknown heirs and devisees of deceased persons," under which it was brought, made orders which were in effect a collateral attack on its prior orders, order of publication of September 2, 1947, commanding the appearance and answer under oath the petition of the administrators on or before December 15, 1947, of all persons claiming to be heirs at law or next of kin of said James L. Collins, deceased; repeatedly exercised powers as a Probate Court expressly forbidden by Title 11, Section 512, D. C. Code—"The said Probate Court shall not under pretext of incidental power or constructive authority, *exercise any jurisdiction whatever not expressly given by this Code,* * * *." (Emphasis added), overlooked the fact F.R.C.P. and more particularly, that Rule 24, F.R.C.P. expressly repealed all laws in conflict with said Rules, and that Rule 24, F.R.C.P. on timeliness for an application of intervention conflicts with and expressly repealed that part of Title 13-113 D. C. Code upon which the Court of Appeals based its decision, that this Court should exercise its powers of supervision.

IV. The Circuit Court of Appeals for the District of Columbia Circuit decided an important question of federal law ignoring the applicable provisions of Rule 24, F.R.C.P. and Title 13-108 D.C. Code providing that "Publication may be substituted for personal service of process on any defendant—*or against the unknown heirs or devisees of deceased persons*—" (R. 108) and in mistakenly applying the provisions of Title 13-113 D. C. Code (enacted in 1901 but amended in 1902,) so as to remove the word "heirs" in

the caption and substitute the word "parties" and which latter section was repealed by Rule 24, F.R.C.P. in 1938, by express provision that statutes in conflict therewith must yield.

V. Said Court of Appeals has decided an important question of federal statute involving the construction and application of Title 13-108, Title 13-109, Title 13-111 (R. 107-109) of the District of Columbia Code by ignoring these three sections of the Code and virtually wiping them out by the application to this proceeding as the "governing statute" (R. 178) language of Title 13-113, District Code which clearly has no application here, said Title 13-113, even if it were applicable being expressly repealed so far as it conflicts with Rule 24, F.R.C.P. a later statute, effective since 1938, said Title 13-113 having been passed in the year 1901.

VI. Said Court of Appeals by affirming the judgment of the District Probate Court in this case has decided an important question of federal law involving the provisions of Rule 24, F.R.C.P. contrary to the intent and purpose of this Rule, which provides "upon timely application anyone may be permitted to intervene in an action," without ever considering whether the application for intervention was "timely" and blindly following a provision of the D.C. Code, Title 13-113, which had no application to the proceeding before it, sanctioning the action of the District Court in abusing its discretion in granting intervention when the application therefor was not timely. The construction and application of Rule 24 in its relation to Title 13-113, D. C. Code affects a large and important area and has not been but should be decided by this Court.

VII. Due to the prolonged stay order of May 18, 1949, the Petitioners filed an action against the Administrators of the Estate of James L. Collins, deceased, Collins v. Miller, in October 1950, because $50,000 had been withdrawn under

a court order dated January 13, 1947 and had never been accounted for and the trial court denied the right to an account from which order petitioners appealed to the Court of Appeals arguing a motion to dismiss on September 27, 1951 which motion was denied on June 1952, reported as noted above in 198 Fed. 2nd 948; 9 App. D.C. 143. The Court of Appeals wrongfully placed petitioners under a stay order denying the petitioners their lawful right to have that appeal heard on the merits and petitioners were under this stay until November 1953. This Court in all fairness should now review the entire matter and decide that petitioners did have a right to an accounting and compel the Administrators to file that account. The Court of Appeals in placing Petitioners under a stay denied Petitioners due process of law and the lawful right to an appeal not even heard at this late date.

WHEREFORE, the Petitioners, William B. Collins, an individual, and Jeremiah F. Collins, Vera Collins, Sister Mary St. Ursula Collins and Clara Collins, by their attorney William B. Collins pray that Writ of Certiorari be granted herein directed to the United States Court of Appeals for the District of Columbia Circuit, and that on hearing hereof the Judgment of the said Court of Appeals be reversed and that the estate be awarded to Petitioners as the heirs at law of James L. Collins, deceased.

Respectfully submitted,

WILLIAM B. COLLINS,
Counsel for Petitioners
and
WILLIAM B. COLLINS,
Individually, per se

ROBERT LEE COLLINS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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WILLIAM B. COLLINS, INDIVIDUALLY, AND AS TRUSTEE FOR JEREMIAH F. COLLINS, VERA COLLINS, SISTER MARY ST. URSULA AND CLARA COLLINS,

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ANN O'BRIEN, JEREMIAH SULLIVAN, ESTATE OF CATHERINE SULLIVAN, DECEASED, AND ESTATE OF SUSAN S. IRVING, DECEASED,

Respondents.

BRIEF IN SUPPORT OF PETITION

To the Honorable Supreme Court of the United States:

Come now the Petitioners, William B. Collins, individually, and Jeremiah Collins, Clara Collins, Vera Collins and Sister Mary St. Ursula, by William B. Collins, their Attorney, and respectfully file and submit this their brief in support of their Petition for a Writ of Certiorari filed herein as follows:

Opinions of Courts Below

There are no reported decisions of the Courts below except the accounting appeal 198 Federal 2nd, 948, 91 United States App. D.C. 143.

Statement of Jurisdiction

The Supreme Court of the United States has jurisdiction of this proceeding under Title 28, Section 1254, Paragraph (1) United States Code.

Statement of Facts

A brief review of essential facts is necessary to proper argument. Letters of Administration were granted and issued to Charles Perry Miller, Jr., (and Roy M. Perry, since deceased), on June 27, 1946. On July 18, 1947, administrators filed a petition for a Plenary Proceeding under Title 19, Section 311 D.C. Code, requesting that process be issued to all persons claiming a distributive share of said estate. On September 2, 1947, the District Court issued an *in rem* Order of citation for publication directed to unknown claimants including some of the Petitioners and others to all parties not found or "not to be found" and service was had under said publication pursuant to Section 108-111 of Title 13, of the Code. The Court had on July 21, 1947, issued an order authorizing the Plenary Proceedings and directing that process issue by subpoena to all named persons and to the unknown next of kin of James L. Collins, deceased and that as to all parties "not to be found" service by publication was had as above set forth. Said order of publication so published was directed to all claimants *"and all the unknown heirs at law and next of kin of James L. Collins, deceased, and all other persons concerned, claiming or having or claiming to have any right title or interest or claim in and to the said estate be and they are hereby commanded to appear in this Court on the 15th day of December, 1947, to answer under oath the said petition, and to show cause, if any they have, why they severally claim any interest in or claim any distributive share to the estate."* (Emphasis added.)

Answers to the Administrators' petition of July 18, 1947, and September 2, 1947, were filed by certain claimants, (petitioners herein) including William B. Collins, and Sister Mary St. Ursula Collins in which they set forth their claims to a distributive share of estate. On December 17, 1947, the said Court made an Order referring the plenary proceeding to the Special Master.

Hearings were had before Theodore Cogswell, the Special Master, on March 3rd and May 12th, 1948. The Special Master released his Report and Award on August 19, 1948, denying all claims, including the claims of the petitioners to the estate and made a conclusion of law that the estate should escheat to the District of Columbia.

Petitioners filed Exceptions to the Special Master's Report and Award on December 1, 1948, Supplemental Exceptions on December 22, 1948, and a brief in support of the Exceptions on February 14, 1949, in which there was set forth in full the errors of the Special Master in failing to find that the Petitioners were the heirs at law and next of kin of the decedent. Petitioners then moved for a hearing on the award and sought to take an appeal but were blocked by the motions to reopen and the purported stay order.

After argument on April 27, 1949, and the submission of a brief on the jurisdictional question, the District Court issued its Order on May 18, 1949, *re-opening* the proceedings and referred the cause back in violation of Rule 53(e)(2) Federal Rules and Procedure, to the Special Master for the purpose of hearing evidence in support of the claim of Nellie Collins, et al. This Order is the basis of one of the complaints of Petitioners and the record shows no findings or opinion of the Trial Judge other than this order.

Finally and most important, during all this period from May, 1948, when the valid hearing was had, and when these Petitioners produced their evidence under duress and pre-

maturely and were denied more time, until May 6th, 1952, a period of *four years,* Petitioners were denied the right of appeal from the Special Master's erroneous holding and award of August 19, 1948. This entire procedure constituted a brazen and flagrant disregard of these appellants' legal rights and as applied to them in this case made the Constitution of the United States a scrap of paper. Indeed, if the procedure that has been followed in this case and the theories which the District Court pursued here are adhered to elsewhere in the future, every claimant will be subjected to one hundred years litigation, like the hundred years war, in every estate where the local officials do not favor a given claimant.

Specification of Errors

The basic error of the District Court affirmed by the Court of Appeals consisted of the assumption the District Court, as a court of limited jurisdiction, possessed the power of a general equity court or authority under a statute to reopen a closed plenary proceeding by a collateral attack on the final order of September 2, 1947, citing all parties to appear and answer before December 15, 1947.

The second error was in placing the petitioners, parties to the original hearings under a void stay order and in defiance of every requirement of due process of law prohibiting petitioners from cross examining witnesses or being parties to the later hearings in which the court accepted only "evidence in favor of" later claimants.

The third error was the District Court's assuming the power to hear a motion to reopen a proceeding for mistake in violation of Rule 60(b) more than six months after the order of September 2nd, 1947, citing all parties to appear and answer by December 15, 1947. This ruling was directly

in violation of the decisions of this Court. (See *Ackerman* v. *U. S.*, 340 U. S. 193, 197).

The fourth error was that the Court of Appeals erred in construing and applying Title 13-113 D. C. Code as the "governing statute" in this proceeding and deciding the case under that title because an attempted intervention was made "before the final determination of the suit" when that Title of the Code was inapplicable and the proceeding was clearly governed by Title 13-108 D. C. Code which provides for service by publication "against the unknown heirs of deceased persons" and is clearly applicable.

The fifth error was the Court of Appeals erring in holding that the "governing statute" was Title 13-113 D. C. Code, enacted year 1901 when the provision thereof relied upon in arriving at its decision in this case, was in conflict with a later statute, Rule 24, Federal Rules Civil Procedure, and said Title 13-113 was expressly repealed on September 16, 1938 by the express language of the law enacting said Rule 24 Federal Rules Civil Procedure.

The sixth error was the Court of Appeals erring in ignoring Rule 24 Federal Rules Civil Procedure which must be construed with Rule 60(b) under which intervention must be brought, by failing to hold that said application was not timely, the said Rule providing "Upon timely application anyone shall be permitted to intervene in an action" when said application was made about 2½ years after the date December 15, 1947, when all claimants were commanded to appear and answer under oath the petition of the administrators dated July 18, 1947.

Argument

I

The *in rem* order of September 2, 1947 commanding all persons having any interest in the estate of James L. Collins to appear and answer before December 15, 1947 was a probate *in rem* order binding on all parties everywhere. *Goodrich* v. *Ferris,* 214 U. S. 71, 80 (145 Fed. 844); *The Mary,* 9 Cranch 126, 144; *In Re Anderson's Estate* (71 Pac. 2d 1013, 1015); *Ferguson, et al.* v. *Price,* 173 S. E. 1, 3 (N. C.); *Security First National Bank* v. *Superior Court,* 37 Pac. 2d 69, 71.

In *Goodrich* v. *Ferris,* 214 U. S. 71 at 80 this Court said: "It is elementary that probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding *in rem* and is therefore one as to which all the world is charged with notice."

In *Security First National Bank,* 37 Pac. 2d 69 at 71 the Supreme Court of California said: "The notice required by the sections (publication, etc.) is constructive notice to every one of the pendency of the proceedings, and a hearing had and order entered pursuant thereto is conclusive upon all parties in interest".

The foregoing decisions conclusively hold that the order of September 2nd, 1947 compelled the Appellees to appear before December 15, 1947 or be forever barred. No application has ever been made to set this valid order of September 2, 1947 aside. It was illegally collaterally attacked in violation of Rule 60(b) more than a year later by petitions to reopen and by the void application of Appellees to intervene in the void reopened proceedings in April, 1950, over 2½ years too late.

II

Rule 60(b) Federal Rules Civil Procedure contains a jurisdictional time limitation of six months from the date of the order within which a motion to reopen a proceeding must be made. *Ackermann* v. *U. S.*, 340 U. S. 193, 197, 95 L. Ed. 207; *Brooks* v. *Nelson*, 95 C. A. 144, 272 Pac. 610 (Rule 60(b) taken from 473 C. C. P.); *Anderson* v. *Yunkau*, 329 U. S. 482, 91 L. Ed. 436 (Rule 25 held mandatory).

Rule 60(b) during the years 1938 through March 19, 1948, provided as follows: "On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, # 118, a judgment obtained against a defendant and not actually personally notified."

The immigration case of *Ackermann* v. *U. S.*, *supra*, is a squareholding that Rule 60(b) is jurisdictional.

In *Ackerman* v. *United States*, 340 U. S. 193-197, the Court said: "It will be noted that petitioner alleged in his motion that his failure to appeal was *excusable*, a motion for relief because of excusable neglect as provided in Rule 60(b)(1) must, by the Rule's terms, be made not more than one year after the judgment was entered. The judgment here sought to be relieved from was more than four years old. It is immediately apparent that no relief on account of

'excusable neglect' was available to this petitioner on the motion under consideration."

Even as amended Rule 60(b) did not add or change the position of new found claimants because the amendment of Rule 60(b) did not take effect until over a month after the six months period from September 2, 1947 had expired and furthermore no claims whatsoever appeared within a year from September 2, 1947 the date of said order so none of the claims allowed to come in by the Court's order of May 18, 1949 were properly filed.

This Court in *Anderson* v. *Yunkau, supra,* stated: (quote) "The word 'shall' is ordinarily the language of command." Shall in the past tense *i. e.* "must" used in 60(b) is even stronger command terminology.

If the decisions of this Court are to be followed it must be held in this case that the District Court had no power to consider a motion to reopen or to intervene more than (6) six months or on any theory one year after September 2, 1947.

In an analagous situation statutes prescribe 6 months or a year as the time for a creditor to file a claim against an estate. Creditors who do not file are forever barred. *Pufahl* v. *Parks,* 299 U. S. 217, 81 L. Ed. 133.

Yet here barred claimants are allowed to take an entire estate though they are nearly three years too late and barred by two express orders of Court Rule 60(b) one July 21 and the other September 2, 1947 and the latter order having been made pursuant to Title 13, Section 108, *not* Title 13-113.

Petitioners Denied due process of law and the right to be heard guaranteed by Amendment V and Amendment XIV U. S. Constitution under stay order of May 18, 1949 and reopening the proceeding. *In Re: Aughenbaugh's Estate,* 125 Fed. 2d 887, 889; *Interstate Comm.* v. *Louisville and*

Nashville R. R., 227 U. S. 88, 93; *Akron R. R.* v. *U. S.,* 261 U. S. 184, 198, 67 L. Ed. 605.

Not only was the probate court without jurisdiction to consider the motion but it had the effrontery to place petitioners under a void stay order and stated in ten separate places only "evidence in favor of the (new) claims" was to be heard or considered at the later hearings. Therefore, it provided in effect that a "Rump Parliament of delinquent claimants" was to be held excluding Petitioners because they were timely and were under a stay order, not parties to the reopened hearings. Also, the Petitioners were *prohibited* from introducing evidence *against* the said claims. This order was a glaring and flagrant denial of Due Process of Law more serious in many ways than the denial resulting from the violation of Rule 60(b).

These violations of procedural rules resulted in the stripping of the Petitioner of the most substantive right of all—the right to be FULLY not partially *heard.* Without a hearing no substantive rights can ever result. There was a flagrant violation of due process of law.

The District Court (in probate) by the order of May 18, 1949 and by subsequent orders admitting new claimants including the reopening of April, 1950, illegally collaterally attacked the final order of September 2, 1947. *Simmons* v. *Saul,* 138 U. S. 439, 34 L. Ed. 1060; *Comstock* v. *Crawford,* 70 U. S. 396 (Wallace) at 403; *McNitt* v. *Turner,* 83 U. S. 852, 16 Wall. 852, 60 C. J. S. 84.

Thus, in the case of *Comstock* v. *Crawford,* 70 U. S. 396, 404 this Court said: "But when by the presentation of a case within the statute the jurisdiction of that Court has once attached the regularity or irregularity of subsequent steps can only be questioned in some direct mode prescribed by law. They are not matters for which the decrees of the court can be collaterally assailed." And at Page 406, "The

proceeding may have originated in a desire to remove doubts suggested as to the regularity of the original sale, but whether this was so or not, the first sale not being set aside, its validity could not be impaired by the second."

As applied here, the orders of July 21, 1947 and September 2, 1947 had to be attacked and set aside before new hearings could be attempted and Petitioners had to be notified and given the status of full fledged *parties* in the reopened proceedings (See cases *supra*).

Conclusion

The alleged order of May 18, 1949, purporting to reopen the proceeding as to Nellie Collins, Appellees, et al. violated the following rules:

(1) Rule 60(b) F. R. C. P.

(2) Rule 53(e)(2) F. R. C. P.

(3) Title 11, Section 512 D. C. Code. Probate Court as one of strictly limited jurisdiction could not reopen hearing.

(4) Rule of law prohibiting collateral attack of prior interlocutory orders.

(5) Rule requiring that all prior parties in a proceeding be given the right to introduce evidence against claims of opponents and the right to appear as interested persons and not be excluded by a stay order.

(6) Rule requiring a speedy appeal after a hearing. (No appeal allowed here from August, 1948, until July, 1952.)

(7) No notices sent to appellants of hearings after June, 1950.

We feel that the failure to observe these minimum requirements procedurally and basically constitutes a substantive taking of property without due process of law under Amendment V United States Constitution.

There was a gross violation of the requirement of due process of law pin-pointed by Petitioners' exclusion from

all of the later hearings by reason of the stay order of May 18, 1949. It was a "Star Chamber" proceeding in all respects.

In *United States* v. *Mooney,* 346 U. S. 1, Dissent of Justice Douglas, at Page 13; "A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense."

In the case of *In Re Augenbagh,* 125 Fed. 2d 887, at 889, the Third Circuit Court of Appeals held: "Manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain or refute."

The Court of Appeals in the instant case holds diametrically the opposite of this—"only evidence in favor" is valid. This conflict of decisions on this vital point is a paramount reason for granting a hearing.

Our contention is that we were entitled under the leading heirship case of *O'Day* v. *Sup. Ct.* (California), 116 Pac. 2d 621, 18 Cal. 2d 540, to cross-examine witnesses and be a real party to the reopened proceedings and that said proceedings should not have been restricted to the persons specifically named in the order of reopening, if the Court had any right to reopen the case.

The most pressing consideration on this writ is by what divine right theory could all proceedings on the first Report and Award be stayed and petitioners placed in suspension as complaining parties from that Award and be by specific language excluded from the reopened proceedings. It was a void order clearly against "due process" and yet this is the reopened pending void proceeding into which Appellees were permitted to intervene on April 19, 1950, 2½ years after the dead line of December 15, 1947, set by the order of publication dated September 2, 1947. In the language of

the prize ring, it forced us to take punishment with both hands tied behind our backs. That is not fair play and is contrary to every conception of "due process". It is such a marked departure from the usual and customary procedure in English-speaking courts that it exemplifies a one-sided approach and we feel is grounds for the exercise of supervisory control by the Supreme Court on an application for a writ of certiorari.

The Petitioners Substantive Rights Are Sound

Our case rests on absolute identity of a name 3 names the same in the 2 families and on positive evidence of resemblance (R. 48 to R. 55) (R. 54) (R. 55) (R. 56). The Special Master at the hearing excluded (R. 39) (R. 26) (R. 27) (R. 12) (R. 13) all but documentary evidence from consideration (R. 12) (R. 26) The disregarded identity of name (R. 33) in violation of the following decisions. Estate of *Williams,* 128 Cal. 552, 61 Pac. 670; *Crandall* v. *Lynch,* 20 App. D. C. 74, 84; *In re Maher's Estate,* 79 Pac. 2d 984, 119 ALR 91 (Wash.) (See R. p. —).

The First Report and Award of the Special Master states he considered only documentary evidence (See R. p. 82) (R. 33).

The exclusion of evidence of resemblance in violation of the universal rule followed in all Anglo-Saxon nations for two hundred years presents the most far reaching and unjustifiable error committed (R. 53) (R. 52). Beginning with the *Doublas Peerage* case, 1769 Harger Jurid. 386, 402 and including *Day* v. *Day,* Chancellors VIII 353 and the late case of *Thomas* v. *U. S.,* 121 Fed. 2d 905 D. C. that evidence of resemblance must be admitted. The cases are collected in 39 Law Quart. Rev. 297. In *Day* v. *Day, supra,* Heath (Justice) said in regard to evidence of resemblance: "But if you are convinced that it does exist, it is impos-

sible to have stronger evidence." Instead of admitting this strong evidence the Special Master threatened our counsel with contempt if he produced another witness to so testify. This was conduct on his part which showed a bias and prejudice impossible of measurement but so great we never had a hearing. This Court has a duty to reverse under the uncontradicted evidence rule because no evidence was produced against our position at the original hearing. *Kelly* v. *Jackson*, 31 U. S. 622, 631.

If our contentions in our brief are correct, and we believe they are, everything that took place in this case after May 1, 1949, is void and that leaves this case where it was after the Special Master filed his First Report and Award on August 19, 1948. This estate should be awarded to these petitioners because they have proved they are the heirs. The presumption that decedent left heirs has not been overcome by any evidence. Petitioners should be awarded this estate.

WHEREFORE, Petitioners, William B. Collins, Jeremiah Collins, Clara Collins, Vera Collins and Sister Mary St. Ursula pray that a Writ of Certiorari be granted herein directed to the Court of Appeals of the District of Columbia, and that on hearing hereof the judgment of the said Court of Appeals be reversed and that petitioners be held to be the lawful heirs as provided by law.

Respectfully submitted,

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